

**UNPUBLISHED**  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF IOWA**  
**WESTERN DIVISION**

BOBBY R. BURKS,  
Plaintiff,

vs.

JO ANNE B. BARNHART,  
Commissioner of Social Security,  
Defendant.

No. C03-4019-MWB

**REPORT AND RECOMMENDATION**

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## ***I. INTRODUCTION***

The plaintiff Bobby R. Burks (“Burks”) appeals a decision by an administrative law judge (“ALJ”) denying him Title II disability insurance (“DI”) benefits and Title XVI supplemental security income (“SSI”) benefits. Burks argues the ALJ erred in (1) improperly relying on opinions of medical consultants, and discounting the opinions of Burks’s treating physician; and (2) presenting an improper hypothetical question to the Vocational Expert. Burks argues that because of these errors, the Record does not contain substantial evidence to support the ALJ’s decision. (*See* Doc. No. 6)

## ***II. PROCEDURAL AND FACTUAL BACKGROUND***

### ***A. Procedural Background***

On August 16, 2001, Burks filed applications for SSI and DI benefits, alleging a disability onset date of January 1, 1999. (R. 50-52, 174-76) The applications were denied initially on November 27, 2001 (R. 35, 37-41, 177-82), and on reconsideration on February 26, 2002 (R. 36, 43-47, 185-90). On March 29, 2002, Burks requested a hearing (R. 48, 190A), and a hearing was held before ALJ Andrew Palestini in Sioux City, Iowa, on September 24, 2002. (R. 194-218) Burks was represented at the hearing by attorney Wil Forker. Burks testified at the hearing, as did Vocational Expert (“VE”) Sandra Trudeau.

On December 18, 2002, the ALJ ruled Burks was not entitled to benefits. (R. 11-23) On January 22, 2003, Burks requested review of the ALJ’s decision. (R. 9) On February 25, 2003, the Appeals Council of the Social Security Administration denied

Burks's request for review (R. 6-8), making the ALJ's decision the final decision of the Commissioner.

Burks filed a timely Complaint in this court on March 28, 2003, seeking judicial review of the ALJ's ruling. (Doc. No. 3) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Burks's claim. Burks filed a brief supporting his claim on July 2, 2003. (Doc. No. 6) The Commissioner filed a responsive brief on August 19, 2003. (Doc. No. 10). The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Burks's claim for benefits.

## ***B. Factual Background***

### ***1. Introductory facts and Burks's daily activities***

#### ***a. Burks's testimony***

At the time of the hearing, Burks was 40 years old. He resided in Sioux City with his three-year-old daughter and the child's mother, Burks's former girlfriend. (R. 197) He had completed the seventh grade and part of the eighth grade in school, and stated he went to "Special Ed school." (R. 204)

Burks stated he was taking Zyprexa, which was prescribed by Siouxland Mental Health for dizziness. He started taking ten milligrams per day, but the dosage had been increased to 20 milligrams per day.<sup>1</sup> (R. 198) He also was taking 20 milligrams of Celexa a day, for depression. (R. 198-99) He stated he had been depressed for about two

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<sup>1</sup>When Burks was asked how much Zyprexa he was taking after the dosage was increased, he initially stated, "I'd say about a hundred." (R. 198) However, he then agreed that if the records indicated 20 milligrams per day, that would be correct. (*Id.*)

years, and he had been going to Siouxland Mental Health for about five months.<sup>2</sup> He stated was seeing a counselor named Judy on a monthly basis, and he also saw the doctor at times. (R. 199) He stated Judy “asks me questions about how the medicine is doing and [if] I’m still having dizziness spells and bad dreams and flashbacks.” (*Id.*) Burks stated when he is depressed, he does not eat. At the time of the hearing, Burks was 5'8" tall and weighed about 139 pounds. (R. 204) He stated 139 was not his normal weight, and then stated he used to weigh 140 pounds. (R. 211)

Burks stated he has bad dreams about “[f]alling off of something high all the time, and it turns black dark.” (R. 199-200) He has the dreams about three times per week, when he is “real tired.” (R. 200) He stated he also has flashes of blue and yellow lights, and explained, “I get dizzy and I fall on the floor and I don’t even – I wakes up and I don’t even know what happens.” (*Id.*) He stated the light flashes occur with headaches, which began when he was hit in the head with a bottle as a child. He stated further, “[A]lso when I was little I was hold down and drugs was given to me and I was sent to the hospital and sent to two institutions. Then I was sent to the State Mental Institution in Austin, Texas.” (*Id.*)

Burks explained that he hears voices, “[I]like somebody telling me stuff. . . . Basically, come here. I told you to do this here.” (R. 205) He will hear one or two voices. This usually occurs when he is alone. When asked if the frequency of his hearing voices had changed since he got on medication, Burks responded, “Basically the medication just make me tired and I get rest.” (*Id.*) The medication helps him sleep better, but he still only sleeps about six hours at night. Before he got on medication, he

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<sup>2</sup>The Record indicates Burks’s initial evaluation at Siouxland Mental Health was on June 21, 2002, three months before the hearing. (R. 170-72)

would sleep about five hours at a time, but the medication has improved the quality of his sleep; he stated it makes him sleep “a lot better.” (R. 211)

He explained he has problems with his memory and will forget to turn off the stove, or forget to turn off the water and let the tub over-fill. (R. 205) He also stated friends have told him he talks to himself, but he does not realize it. This occurs “mostly sometimes when [he has] flashbacks about somebody that done this stuff to [him].” (R. 208-09)

In a typical day, Burks stated he does “[b]asically nothing, hardly.” (*Id.*) He gets up around 5:00 or 6:00, and usually goes to bed around midnight or 1:00 a.m. (R. 210-11) He usually watches about four hours of television, and he enjoys “All My Children,” “Cops,” and football. He has about four friends who stop by to check on him regularly and see if he needs a ride somewhere. (R. 206) Occasionally, he will take a nap. (R. 211) He looks through the paper, but he can only read it “[a] little bit.” (R. 209) He had trouble reading the letters he received from the Social Security Administration, and he had someone else read the letters to him. (*Id.*) He received a form asking him to list his medications, and he took the form to Siouxland Mental Health and had them fill it out. In addition, he obtained prescription records from Walgreen’s. (*Id.*)

Burks stated he sometimes will walk around outside. He does not do any grocery shopping, does not go to the mall or do other types of shopping, and does not have a driver’s license. (R. 210) He lost his driver’s license 14 years before the hearing “[f]or driving and drinking.” He had never tried to get his license back because he could not pay the fines. (R. 213) He becomes paranoid in crowds and does not like to be around a lot of people. He generally does not trust people, stating that when he was a child, a man tried to pull Burks into his car. (R. 210)

Burks noted his three-year-old daughter is home during the day. Her mother takes care of the child when she is home, but her mother works at Horizon Restaurant from 5:00 a.m. to 2:00 p.m. on Mondays, and Tuesday through Friday. (R. 212)

Burks worked at John Morrell for about ten years, “picking up stuff on the floor and running a . . . saw.” (R. 201) He suffered from headaches during that time period, but worked anyway. He was moved to a different job and suffered an injury to his right hand. He eventually left the job because he was having “problems with transportation” and he was late frequently. (*Id.*) Burks stated he could no longer do the type of work he was doing at John Morrell due to his headaches and he “falls out.” (R. 201-02)

After he left John Morrell, Burks worked one day through Labor Ready, picking up and stacking scrap aluminum. He worked about five hours that day; it was just a one-day job. He then worked at Horizon Restaurant for two months as a busboy and dishwasher. He explained he left that job “[b]asically because my head started hurting, and my ears started popping, and I started seeing these blue and yellow flashes.” (R. 202-03) He had another job through Labor Ready, working as a garbage collector for about two months. While he was on that job, he “started getting real dizzy again” and his head would hurt all the time. (R. 203) He left because the job ended; it was just a temporary job through the summer. (*Id.*) Burks stated he could not return to that type of work because his “head hurts and [he] keep[s] seeing flashes.” (R. 203-04)

Burks stated he has tried taking aspirin and Ibuprofen for his headaches, but they do not work. (R. 206) His headaches usually last “[a]ll night long.” (R. 207) He can “numb [his] head” and stop the headaches by putting on a baseball hat and tightening it up “real tight” on his head. (*Id.*)

When asked how he gets along with people, Burks responded, “Not too good.” He argues a lot with his girlfriend and his friends. He used to argue with his coworkers when

he was working, primarily about “[t]hings that they wanted me to do that I wasn’t supposed to be doing. . . . Like going in the cooler, cleaning it out, when I’m not supposed to be in there doing it.” (R. 207-08) He also had problems with his supervisors, and stated some of the problems were racial in nature.<sup>3</sup> (R. 208)

Besides the headaches, Burks stated he also has trouble with his right kneecap, which he fell on once when he was dizzy. He explained, “Every time I walks on it a lot it swells back up.” (*Id.*) He can walk “about a mile” before his knee will begin to swell. (*Id.*)

In response to the ALJ’s questions, Burks stated he drinks “[p]robably a beer every now and then.” (R. 213) He denied ever using any drugs besides his prescribed medications. He stated some cocaine was put into his car when he was working at John Morrell, and he was arrested and spent one day in jail. According to Burks, he was released and went back to work at John Morrell, but then he was arrested again when he failed to appear for court. Burks claimed he never received notice of a hearing date, and his lawyer also was not notified. (R. 214) He stated that after he was re-arrested, he was kept in jail “for 32 days until [he] lost [his] job.” (R. 215) In response to the ALJ’s question, “Did they just drop the charges?” Burks responded, “Yeah, and made me pled [sic] guilty to it being in my car.” (*Id.*) He agreed with his attorney’s explanation that he pled guilty to a simple possession charge, he was given credit for time served, and he was released from jail. (*Id.*)

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<sup>3</sup>Burks is African American.

***b. Documentary evidence***

On October 2, 2001, Burks completed a Daily Activities Questionnaire. (R. 82-85) He indicated he was living in a house with his girlfriend and “children.” (R. 82) He stated he rarely bathed/showered or dressed, he cared for his hair and shaved only with help or reminders, and he was unable to care for himself adequately without help from friends. He rarely did laundry or dishes or took out the trash, and he never did any cooking or shopping, ran errands, changed his own sheets, did ironing, vacuumed or swept the floor, repaired appliances, repaired or washed a car, mowed the lawn, raked leaves, or did other gardening work. Regarding his sleeping habits, he stated, “I don’t sleep very much, but I just go to sleep whenever I feel tired, [and] sometimes I stay up all night.” (R. 82-83) Burks indicated he has trouble finding his way around in unfamiliar areas and cannot use public transportation without help. (R. 83) He noted he tries to help out caring for his daughter “as much as I can when I can.” (*Id.*)

At the time Burks completed the form, he stated he was not taking any medications. (*Id.*) He listed no hobbies or interests, noting, “I just stay home and watch the T.V.” (R. 84) He stated he sometimes has difficulty going out in public, but provided no explanation. He sometimes visited friends who lived “[r]ight up the street from [his] house.” (*Id.*) He rarely engaged in social activities. (*Id.*) He indicated he was not able to handle bills and manage money, but he failed to indicate who helped him with those tasks. (R. 85)

In contrast to his testimony, Burks indicated on the form that he has no problems getting along with others, and he gets along “adequately” with former employers, supervisors, and coworkers. However, he noted it bothers him “a lot” when someone points out his errors and mistakes, and he will “ask the other person to shut up,” which sometimes gets him into trouble. (R. 84)

Burks indicated he has a lot of problems concentrating and remembering, and he sometimes has difficulty adjusting to changes, completing a task or chore, and following directions. He stated, "I will stand and just don't even finish." (R. 85) Asked how he respond to stress, Burks stated, "I go off by myself and drink and get mad." (*Id.*) He indicated, "I am not able to think well and thereforth [sic] I have problems with just about everythink [sic]." (*Id.*)

At the time Burks applied for reconsideration of his claim, he noted his vision was getting worse, and he was experiencing "flashbooks" and headaches. (R. 97) He reported he could care for his personal needs. (R. 99)

Burks completed a second Daily Activities Questionnaire on January 5, 2002. (R. 104-107) At that time, he indicated he bathed/showered and dressed regularly, but still shaved and cared for his hair only with help or reminders. He indicated he still was unable to care for himself "very well without help." (R. 104) He still had trouble sleeping. Where he previously had done laundry and dishes rarely, he now indicated he never did those tasks. (*Id.*) Burks had begun taking medication for "very bad head pain," and he did not need reminders or help taking his medication. (R. 105) He indicated he sometimes played games "with the children," and he watched "life time T.V." (R. 106) His other activities were unchanged from the prior report.

Burks stated he called friends every other week and had them pick him up and take him to their homes. He sometimes had difficulty going out in public and had occasional problems getting along with others because people would look at him and make fun of him, which made him mad. He indicated he got "involved socially" on a weekly basis. Burks stated he got along poorly with former employers, supervisors, and coworkers because they were always telling him what he was doing wrong or what they did not like about him. (*Id.*)

Burks indicated he has trouble remembering things people tell him, and changes bother him because he has enough trouble remembering what to do without changes. (R. 107) He noted sometimes he is asked to go pick up something at the store which is about three blocks away, and by the time he gets there, he cannot remember why he is there. (*Id.*) Burks stated his mother “makes the money so she pay bills,” but if he has money, he is able to pay his own bills. (*Id.*) He stated further, “If I could work I would work but I am not able to work and that stress[es] me out because I can not take care of my kid.” (*Id.*)

Burks completed a Migraine Headache Questionnaire on January 22, 2002. (R. 112-13) He stated he has “very bad headaches” that keep him from sleeping at night. The headaches made him mad and he would “hear loud sounds” and sometimes vomit. (R. 112) He did not know what caused the headaches, but stated he had them almost daily, and they would last from two to six hours each. The headaches restricted his activities; he stated he was unable to do anything during a headache, and when the headache ended, he had to go to sleep. (*Id.*) Burks stated pain pills eventually would make the headaches go away, and a cold towel on his head also helped. He stated he needed “more medical attention,” but he lacked the funds to see a doctor and he did not have a “medical card.” (R. 113)

Rosie Burks, who is Burks’s aunt (*see* R. 108), completed a Supplemental Disability Report dated September 25, 2001 (R. 86-88), in connection with Burks’s original application, and a Daily Activities Questionnaire on January 11, 2002, when Burks applied for reconsideration. (R. 108-11) In the second report, Ms. Burks indicated her nephew’s last visit to Houston, where she lives, was in 1988, so her recollections regarding his functioning and habits would have been quite outdated at the time she completed these forms. However, her recollections were consistent to a large degree with Burks’s

condition fourteen years later, at the time of the hearing. She recalled that when Burks was in Houston, he cooked only rarely, and he had to be watched the whole time because he would forget he was cooking. (R. 109) He was basically antisocial, did little or no housework, and had very few activities. She recalled him stating he was “seeing things and hearing voices.” (*Id.*) She noted that when she talked with Burks on the telephone prior to completing the questionnaires, she could tell “something was w[r]ong” (R. 88), and the “change in his voice” indicated “he was not taking his medication.” (R. 111) She recalled that Burks had trouble remembering what people said, and had a lot of difficulty completing a task or chore. (R. 87, 111)

## **2. *Burks’s medical history***

Burks presented very little in the way of treatment history. He first sought treatment at Siouxland Mental Health Center (“SMHC”) on June 21, 2002, on referral from Thomas J. Clark, D.O., a neurologist who conducted a consultative examination of Burks in February 2002, at the request of Disability Determination Services (“DDS”). At his intake evaluation with SMHC, which was conducted by psychiatric nurse practitioner Judith A. Buss, Burks gave the following description of his mental health complaints:

The patient complains of dizziness, blackouts, seeing blue and yellow spots. He fell hitting his knee. Says that he has amnesia. . . . The patient fell and hurt his knee during a black out period. The patient states that he has nightmares, difficulty sleeping, falling asleep. He complains of his legs feeling numb and swelling up. He has some suicidal thoughts, but no plan and nothing active. He has homicidal thoughts of killing someone else, especially people who have done things to him. He says he hears voices in his head. He says that he stutters, and sometimes it is really bad. He is currently living

in Sioux City with his girlfriend, her two children, and a roommate. . . .

(R. 170)

Burks gave a brief history of past psychiatric problems, as follows:

The patient says when he was 12 years old, some guys gave him some bad drugs. He was hospitalized in Texas one time, and also in a state hospital in Texas, and in another hospital in Texas called Jefferson Davison [sic]. He was also . . . at Summit Oaks which is a treatment facility and mental health center in Longville Texas. He has no other psychiatric history. He can't remember being on medication, but knows he was and can't relate if it helped or not.

(*Id.*) Burks stated he had "a history of seizures from medicine." (*Id.*) He reported having "many head injuries," with one episode of unconsciousness after he was hit by a beer bottle. He stated his mother hit him once with a broom stick. Other than these incidents, Burks provided no history of serious medical illnesses or surgery, stated he was not taking any medications, and denied have other current medical problems. (*Id.*)

Ms. Buss noted Burks appeared to be of low intelligence, and he had poor judgment and insight. (R. 171-72) He was cooperative and maintained good eye contact. He denied having auditory hallucinations at the time of the interview, and Ms. Buss noted he "did not appear to be responding to internal stimuli, [and ] although[] his train of thought exhibited some looseness of association, it was goal oriented." (R. 171) However, she further noted he was "barely" oriented to person, place and time, and he gave poor information. He could not identify the Governor of Iowa, but could name the President. He recalled "three out of three objects after one, five, and fifteen minutes," and had concrete abstractions. He was unable to do serial 7's, spell "world" backwards, or do proverbs. (*Id.*)

Ms. Buss concluded Burks met the criteria for Schizophrenia Paranoid Type, ruling out PTSD; Antisocial Personality Disorder; Borderline Intellectual Functioning; and Learning Disability by history. (R. 172) She assessed his current GAF at 50, which is indicative of “serious symptoms (*e.g.* suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (*e.g.*, no friends, unable to keep a job).” *Morgan v. Comm’r of Social Security*, 169 F.3d 595, 598 n.1 (9th Cir. 1999); *see Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) (“DSM-IV”), at 32. Ms. Buss indicated she would review her findings with “Dr. Brinck,” and start Burks on Zyprexa 10 mg. at bedtime. She scheduled a follow-up appointment in one week. (R. 172)

Burks returned for a follow-up appointment with Ms. Buss on July 9, 2002. He reported he was “still having flashbacks,” some depression, and decreased appetite. (R. 168) Ms. Buss increased his Zyprexa to 15 mg., and added 20 mg. of Celexa, an antidepressant. She scheduled a follow-up appointment in two weeks. (*Id.*) No further treatment records appear in the Record, either submitted prior to or after the hearing, or at the time of Burks’s appeal.

The only other medical evidence in the Record is reports from several consultative examinations, summarized below.

On October 12, 2001, Burks saw R. Bruce Bedell, M.D., an ophthalmologist, at the request of DDS. (R. 126-29) Dr. Bedell examined Burks due to his complaints of seeing “flashes of light in his right eye for several months off and on with spots and colored changes of blue and yellow.” (R. 126) Burks also complained of “having hot flashes, waking up with arms and legs numb, particularly on the right, nasal discharge and a history of memory loss.” (*Id.*) He stated he had not had a physical examination in several years and had no current doctor. (*Id.*) Dr. Bedell found Burks to have 20/20

vision on the right and 20/40 on the left, normal intraocular pressure in both eyes, and no evidence of any disabling visual abnormality. The doctor opined glasses for distance would be helpful. (*Id.*)

John A. McMeekin, Ed.D. performed a psychological/intellectual assessment of Burks on January 10, 2002, at the request of DDS. (R. 130-38) Dr. McMeekin took a comprehensive history from Burks. Among other things, Burks reported having flashbacks of seeing his stepfather murder his mother in the 1970s. He also stated his stepfather tried to kill him, and on one occasion he saw his stepfather “drag his grandmother out of a store with [a] ‘hook’ knife to her throat.” (R. 131) His grandmother’s trauma apparently resulted in her having a stroke. (R. 132) Burks reported that his stepfather went to prison. (R. 133) Burks stated he is frightened by doors slamming and by yelling, which remind him of his stepfather’s behavior. (*Id.*)

Burks related that his headaches began when some “younger men or older teenagers put drugs up his nose.” (R. 131) He stated he was hospitalized for about 90 days, was released, then went to the “Austin State institution” for a year, and then went to Summit Oaks Treatment Center for four years, until he was eighteen. (*Id.*)

Burks described problems he had experienced on the job, noting “he sometimes forgot what he was doing and got yelled at.” (R. 131) Dr. McMeekin speculated Burks’s problems possibly were related to “distractibility due to flashbacks or preoccupations.” (*Id.*) Burks stated he would go “into a daze,” thinking about things that had happened to him, his mother, his “vicious stepfather,” and how his grandmother was treated. (R. 131-32)

Burks told Dr. McMeekin he did not cook meals or “do much of anything” because his girlfriend would tell him he was not doing things right and yell at him, “so he just kind

of backs off.” (R. 133) He stated he did some chores “like making the beds and picking up toys.” (*Id.*)

Burks described the incident when cocaine was found in his car. He told Dr. McMeekin he saw someone put the drugs in his car. He spent thirty-two days in jail and lost his job, and John Morrell would not rehire him. (R. 132) Dr. McMeekin noted Burks “has a history with the law, DWI, public intoxication, drug possession, and assault.” (*Id.*) He “mentioned he lost his driver’s license for driving under the influence,” and he would have to pay a \$700 fine to get his license back. (R. 133) Burks denied any abuse of alcohol or other drugs. (*Id.*)

Burks reportedly worked at Cub Foods in Sioux City for about three months, but he was laid off when the store changed hands. Although Burks described the job as stressful, Dr. McMeekin did not interpret Burks’s description of the job as stressful. However, he noted Burks’s responses to questions about the job were “kind of awkward,” and Burks indicated his employer “did not know in what department they would have his check when it was time to get his check, or else they would call [him] up to work shifts when [he was] not scheduled because other people did not show up.” (R. 132) Burks told the doctor he did not get along well at the job and he did not miss the job. (*Id.*)

Burks stated his flashbacks worsened two years earlier, which Dr. McMeekin noted was “coincidentally . . . the time his child was born.” (R. 131) Burks explained he had not worked since the Cub Foods job because of his headaches and the flashbacks, but Dr. McMeekin speculated “he has the child and I think that could be a reason. His girlfriend does work two jobs.” (R. 132)

Dr. McMeekin administered one formal test: the Wechsler Adult Intelligence Scale III (WAIS-III), on which Burks attained a verbal score of 65, a performance score of 79, and a full scale IQ of 69, which Dr. McMeekin stated is “at the very top of the area of

Mild Mental Retardation.” (R. 135) From his mental status examination and the test results, Dr. McMeekin diagnosed Burks with Post-Traumatic Stress Disorder (“PTSD”), and gave him a current GAF of 63 (R. 137), which would indicate mild symptoms or some difficulty with social and occupational functioning. *See* DSM-IV at 32.

Dr. McMeekin found Burks would be able to remember and understand instructions, procedures, and locations, within the limits of a person with intellectual functioning in the Mild Mental Retardation area. However, he noted the test results should be interpreted with caution because Burks “is a minority member with poor educational background” and “comes across as brighter than this in terms of general intelligence and presentation[.]” (R. 137) He observed that “within his own minority group,” Burks “could be clear up to the Low Average area”; however, “he looks as if he could have been quite deprived” in his education. (R. 136)

Dr. McMeekin found Burks had “adequate skills” and “no gross deficits” in the area of interacting appropriately with supervisors, coworkers, and the public, and he “should” be able to use good judgment and respond appropriately to changes in the work place. (R. 137-38) He concluded Burks would be able to handle money adequately. (R.138)

In the area of “ability to carry out instructions, [and] maintain attention, concentration, and pace,” Dr. McMeekin’s conclusion is somewhat unclear. He noted Burks “attend[ed] adequately to respond appropriately to various questions on the examination,” and he “applie[d] himself on the WAIS-III.” (R. 137) These statements appear to conflict with the doctor’s notes on various sections of the testing. For example, he noted the following:

[Burks] appears to do adequately. I am concerned initially about his performance on Picture Completion. He has

the first six items correct, then has items fourteen, eighteen, twenty, and twenty-one, a lot of scatter. If he can get twenty and twenty-one[,] I expect him to be able to get many of the easier ones, so I am not sure what is going on there, but it is unusual. I do not think he is used to this sort of format, so it is probably more alien to him than typical, and that could be part of it.

On Vocabulary he has mostly two point answers for the first nine items. After that [he] does not really come up with anything, so performance disintegrates quite rapidly there. On Digit Symbol he persists throughout the line, but then I have to tell him both times to continue to the next line. He looks up to me, so maybe again an especially foreign format for him.

(R. 135) Dr. McMeekin's speculation that Burks's confusion and apparent loss of concentration resulted from the "foreign format" of the test could be accurate; however, Burks's behavior during the testing also is consistent with Burks's claim, and his aunt's observation, that he has trouble concentrating for very long at a time, and he sometimes forgets things from moment to moment.

Neurologist Thomas J. Clark, D.O. performed a neurologic evaluation of Burks on February 8, 2002, at the request of DDS. (R. 139-41) Dr. Clark had no medical or psychological records regarding Burks other than Dr. McMeekin's evaluation. Dr. Clark noted Burks's patient history form appeared to have been completed by "his wife." (R. 139) Burks gave the doctor "a convoluted complicated medical history of headaches since the age of 12." (*Id.*) Burks complained of intermittent vertigo and hot flashes for the preceding three years, and reported waking to "blackness in the morning," sometimes accompanied by nausea and vomiting. He also complained of paresthesias in his face and both legs, pain in both lower limbs, difficulty with sexual functioning, staring spells,

confusion, memory loss, and difficulty concentrating, expressing himself, and reading.  
(*Id.*)

Dr. Clark's examination indicated Burks had no obvious speech or language difficulties, he followed commands appropriately, and he had "no overt difficulty with concentration." (R. 140) Dr. Clark opined Burks's headaches could be related to past trauma, "although the history is not quite clear." (*Id.*) He noted the clinical findings were suggestive of "frontal lobe dysfunction with both the frontal release signs and subtle abulia and lack of motivation." (R. 140-41) He further noted Burks's "symptoms of persistent vertigo, nausea, and vomiting upon arising in the morning could suggest posterior fossa pathology." (R. 141) Dr. Clark concluded:

Although I suspect that [Burks] has an undiagnosed neurologic problem accounting for the headaches and some of his behavioral abnormalities, there is no neurologic reason why he should not be able to lift and carry 25-50 pounds on a frequent basis. Standing, moving, walking, and sitting in an 8 hour day in all likelihood would not pose any significant problem at present unless the vertigo is to become more persistent. Stooping, climbing, kneeling, and crawling should be avoided.

More importantly, [Burks] needs to undergo appropriate testing for the headache. I have given him the name of both the Siouxland Community Health Center and the Siouxland Mental Health Center so that he could get into the system. Imaging of the brain with CT or perhaps MRI would be reasonable. Medical management of his headaches should also be initiated.

(*Id.*)

As noted previously, Burks did not follow up with Siouxland Mental Health until four months later, in June 2002. There is no evidence in the Record that he ever had a CT scan, MRI, or other diagnostic testing or treatment related to his headaches.

Herbert L. Notch, Ph.D. completed a Psychiatric Review Technique of Burks on February 12, 2002. (R. 142-55) Dr. Notch found there was insufficient evidence to arrive at a medical disposition from Burks's alleged disability onset date to January 10, 2002. From that date forward, he recommended a Residual Functional Capacity Assessment, based on a diagnosis of episodic PTSD. (R. 142-43, 147) For the time period from January 10, 2002, forward, Dr. Notch rated Burks's functional limitations, finding him to have a moderate degree of limitation in his activities of daily living, ability to maintain social functioning, and ability to maintain concentration, persistence, or pace. He further found Burks had never had an episode of decompensation of extended duration. (R. 152)

Dr. Notch then performed a Mental Residual Functional Capacity Assessment (R. 156-61), again for the period from January 10, 2002, forward. He found Burks to be moderately limited in his ability to carry out detailed instructions; maintain attention and concentration for extended periods; perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances; complete a normal work day and work week without interruption from psychologically-based symptoms; perform at a consistent pace without an unreasonable number and length of rest periods; respond appropriately to changes in the work setting; and set realistic goals or make plans independently of others. He found Burks to have no other significant limitations.

In his Medical Consultant Review Summary, Dr. Notch noted Burks had not been treated for emotional problems since he was a teenager, resulting in a lack of information for the period prior to January 2, 2002, when he saw Dr. McMeekin. (R. 160) Based on

his review of the records, Dr. Notch found Burks to have a severe impairment that did not meet or equal the listings. He found Burks's allegations to be credible, and concluded:

[Burks] does have post traumatic stress disorder with occasional flashbacks. He also has borderline intellectual functioning per evidence in file. His [activities of daily living] and functional limitations are consistent with borderline intellectual functioning and a retained ability to handle simple 1 or 2-step work like activities with only moderate limitations.

(R. 161)

A Physical Residual Functional Capacity Assessment was performed by Jan Hunter, D.O. on February 24, 2002, restricted to the period from February 2002, forward. (R. 162-67) Dr. Hunter concluded Burks could lift and/or carry 50 pounds occasionally and 25 pounds frequently; stand, walk, or sit, with normal breaks, for a total of six hours in an eight-hour work day; and push or pull without other limitations. (R. 163) The doctor found Burks should never climb ramps, stairs, ladders, ropes, or scaffolds, and he should avoid concentrated exposure to hazards, but otherwise he had no postural, manipulative, visual, communicative, or environmental limitations. (R. 164-65) The doctor found the symptoms alleged by Burks were attributable to a medically-determinable impairment. (R. 166)

The records summarized above comprise the extent of the medical evidence upon which the ALJ's decision was based.

### **3. *Vocational expert's testimony***

The ALJ asked VE Sandra Trudeau the following hypothetical question:

I'd like [you] to initially consider the effect it would have on [Burks's] ability to perform work activity if he's able to lift at least 25 to 50 pounds frequently. Can stand or sit

without difficulty. Should not do any climbing or working at heights. Could occasionally stoop, kneel, or crawl. Could walk up to one mile. Any work activity should be simple, routine, repetitive. No more complicated or complex than his prior work. He could have at least superficial interaction with coworkers in performing the job duties. And any contact with the public would be infrequent, and he should not have to do any reading or writing as part of the job duties. With those limitations and abilities[,] would he be able to return to any of his past relevant work?

(R. 216-17) The VE replied the hypothetical claimant “would be able to return to his past work as the kitchen helper and the head trimmer.” (R. 217)

The ALJ then asked the VE to consider the following:

[What] effect it would have on his ability to perform such work, if because of his various symptoms, including the dizziness, the headaches, the . . . light flashes, depression, flashbacks. He would frequently lose his attention, concentration, and pace, and fail to complete tasks. Would that affect his ability to perform those jobs?

(*Id.*) The VE replied it would, stating the hypothetical claimant “would be unable to perform that work.” (*Id.*) In addition, if the hypothetical claimant were “a younger individual with limited education,” the VE stated there would not be any unskilled work he could perform. (*Id.*)

#### **4.     *The ALJ’s conclusion***

The ALJ found Burks had not engaged in substantial gainful activity since his alleged disability onset date of January 1, 1999. (R. 15, 22 ¶ 2) He found Burks to have “borderline intellectual functioning, an anxiety-related disorder, and post traumatic

headaches,” which impairments were severe, but “not severe enough to meet or medically equal one of the impairments listed in [the regulations].” (R. 16, 22 ¶¶ 3 & 4)

The ALJ found Burks to have the following residual functional capacity:

[Burks can] lift 20 to 30 pounds frequently, sit and/or stand with no difficulty, walk up to 1 mile, should only occasionally stoop, and should never climb or perform work at heights. Additionally, [Burks] is able to perform only simple, routine tasks; should have limited interaction with co-workers and infrequent contact with the public; and should not be required to perform work requiring reading or writing.

(R. 22-23 ¶ 7; *see* R. 21-22) Based on these limitations and the VE’s testimony, the ALJ concluded Burks would be able to return to his past relevant work as head trimmer and kitchen helper, neither of which required “the performance of work-related activities precluded by his residual functional capacity. (R. 23 ¶ 8; *see* R. 22) Further, the ALJ found Burks’s medically-determinable mental impairments did not prevent him from performing his past relevant work. (R. 23 ¶ 9)

The ALJ concluded Burks’s subjective allegations regarding his limitations were “not totally credible.” (R. 22 ¶ 5) He found that although Burks undoubtedly has some pain and symptoms, “the allegations of symptom levels that preclude all types of work are not consistent with the evidence as a whole and are not credible.” (R. 20; *see* R. 17-20)

The ALJ considered Burks’s claim that his failure to seek medical treatment was the result of insufficient financial resources. The ALJ found that although poverty may be a justifiable cause for noncompliance with prescribed treatment, Burks never took steps “to qualify for a Medicaid card, obtain any low cost medical treatment from his doctor, clinic, or hospital, . . . [or] had been denied medical care because of his financial condition.” (R. 19) Although both Dr. Clark and Dr. McMeekin gave Burks contact information for Siouxland Mental Health, he failed to seek treatment there for several months, and failed

to appear for a scheduled appointment on July 25, 2002. Further, Rosie Burks noted Burks experienced mood swings “‘when he stopped taking his medications.’” (*Id.*) “Consequently,” the ALJ concluded, “[Burks’s] financial hardship is not severe enough to justify his failure to obtain medical treatment and his non-compliance to keep scheduled appointments or take medications as prescribed [is] without justifiable cause.” (*Id.*)

For all of these reasons, the ALJ ruled Burks was not disabled at any time through the date of his decision, and he was not entitled to benefits. (R. 23 ¶ 10)

### ***III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD***

#### ***A. Disability Determinations and the Burden of Proof***

Section 423(d) of the Social Security Act defines a disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is “not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country.” 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *see Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner must determine whether the claimant is currently engaged in substantial

gainful activity. Second, he looks to see whether the claimant labors under a severe impairment; *i.e.*, “one that significantly limits the claimant’s physical or mental ability to perform basic work activities.” *Kelley*, 133 F.3d at 587-88. Third, if the claimant does have such an impairment, then the Commissioner must decide whether this impairment meets or equals one of the presumptively disabling impairments listed in the regulations. If the impairment does qualify as a presumptively disabling one, then the claimant is considered disabled, regardless of age, education, or work experience. Fourth, the Commissioner must examine whether the claimant retains the residual functional capacity to perform past relevant work.

Finally, if the claimant demonstrates the inability to perform past relevant work, then the burden shifts to the Commissioner to prove there are other jobs in the national economy that the claimant can perform, given the claimant’s impairments and vocational factors such as age, education and work experience. *Id.*; *accord Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) (“[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.”) (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)).

Step five requires that the Commissioner bear the burden on two particular matters:

In our circuit it is well settled law that once a claimant demonstrates that he or she is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove, first that the claimant retains the residual functional capacity to do other kinds of work, and, second that other work exists in substantial numbers in the national economy that the claimant is able to do. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982) (*en banc*); *O’Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983).

*Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000) (emphasis added); accord *Weiler v. Apfel*, 179 F.3d 1107, 1110 (8th Cir. 1999) (analyzing the fifth-step determination in terms of (1) whether there was sufficient medical evidence to support the ALJ’s residual functional capacity determination and (2) whether there was sufficient evidence to support the ALJ’s conclusion that there were a significant number of jobs in the economy that the claimant could perform with that residual functional capacity); *Fenton v. Apfel*, 149 F.3d 907, 910 (8th Cir. 1998) (describing “the Secretary’s two-fold burden” at step five to be, first, to prove the claimant has the residual functional capacity to do other kinds of work, and second, to demonstrate that jobs are available in the national economy that are realistically suited to the claimant’s qualifications and capabilities).

### ***B. The Substantial Evidence Standard***

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ’s findings if they are supported by substantial evidence in the record as a whole. *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Weiler, supra*, 179 F.3d at 1109 (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley, supra*, 133 F.3d at 587 (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) (“The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . .”). Under this standard, “[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner’s conclusion.” *Krogmeier, id.*; *Weiler, id.*; accord *Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence “on the record as a whole” requires consideration of the record in its entirety, taking into account both “evidence that detracts from the Commissioner’s decision as well as evidence that supports it.” *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell, id.*; *Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does “not reweigh the evidence or review the factual record *de novo*.” *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (quoting *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it “possible to draw two inconsistent positions from the evidence and one of those positions represents the agency’s findings, [the court] must affirm the [Commissioner’s] decision.” *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *see Hall v. Chater*, 109 F.3d 1255, 1258 (8th Cir. 1997) (citing *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996)). This is true even in cases where the court “might have weighed the evidence differently.” *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); *accord Krogmeier*, 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse “the Commissioner’s decision merely because of the existence of substantial evidence

supporting a different outcome.” *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997); accord *Pearsall*, 274 F.3d at 1217; *Gowell*, *supra*.

On the issue of an ALJ’s determination that a claimant’s subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ’s credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant’s subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler*:

The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant’s prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

- 1) the claimant’s daily activities;
- 2) the duration, frequency and intensity of the pain;
- 3) precipitating and aggravating factors;
- 4) dosage, effectiveness and side effects of medication;
- 5) functional restrictions.

*Polaski*, 739 F.2d 1320, 1322 (8th Cir. 1984). Accord *Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

#### ***IV. ANALYSIS***

As noted previously, Burks argues the ALJ erred in relying substantially on the opinions of the consulting medical experts, and the ALJ was “wrong in substituting his own medical opinions for that of Siouxland Mental Health,” arguing the non-examining medical consultants “did not have the benefit of all the records from Siouxland Mental Health.” (Doc. No. 6, pp. 3, 5) This argument is without merit. Although the Record contains a report of Burks’s evaluation by a psychiatric nurse practitioner, and notes from a single follow-up appointment when Burks’s medication was adjusted, that constitutes the whole of “all the records from Siouxland Mental Health.” The evaluation performed by the nurse practitioner “is not competent medical evidence of a mental or physical impairment.” *Gray v. Apfel*, 192 F.3d 799, 803 (8th Cir. 1999) (citing 20 C.F.R. § 416.913(a); *Jones v. Callahan*, 122 F.3d 1148, 1153 n.5 (8th Cir. 1997)). The Record contains no further evidence of mental health care provided to Burks, either after the alleged onset of his disability, or for earlier periods in his life during which he stated he received extensive mental health treatment. Dr. McMeekin specifically took into consideration the impact of Burks’s reduced mental functioning on his ability to work, and advised Burks to seek treatment for his PTSD.

With regard to his evaluation of Burks’s mental condition, the court finds the ALJ did not err in relying on the reports from the medical consultants when the Record in this case contains *no* evidence from a treating physician, and only one treatment notation from any other mental health practitioners.

Burks further argues the ALJ failed to include Burks’s borderline intellectual functioning in the first hypothetical question to the VE. However, as the Commissioner correctly notes, the ALJ limited the hypothetical to abilities encompassed within borderline

intellectual functioning. The first hypothetical question posed to the VE included the following restrictions:

Any work activity should be simple, routine, repetitive. No more complicated or complex than his prior work. He could have at least superficial interaction with coworkers in performing the job duties. And any contact with the public would be infrequent, and he should not have to do any reading or writing as part of the job duties.

(R. 216)

The Eighth Circuit Court of Appeals has held that although a hypothetical question must include all of a claimant's impairments, "it need not use specific diagnostic or symptomatic terms where other descriptive terms can adequately define the claimant's impairments.'" *Howard v. Massanari*, 255 F.3d 577, 582 (8th Cir. 2001) (quoting *Roe v. Chater*, 92 F.3d 672, 676 (8th Cir. 1996)). Specifically, the *Howard* court found that a hypothetical assuming the claimant "was able to do simple, routine, repetitive work . . . adequately account[ed] for [a] finding of borderline intellectual functioning," and "sufficiently describe[d] deficiencies of concentration, persistence or pace." *Id.* (citing *Brachtel v. Apfel*, 132 F.3d 417, 421 (8th Cir. 1997)). The court finds the ALJ's hypothetical question was proper, and considered Burks's intellectual limitations.

Despite the fact that the court has overruled Burks's objections to the ALJ's ruling, the court nevertheless is troubled by the lack of medical evidence in the Record to support the ALJ's ruling, and finds it necessary to consider whether the ALJ met his burden to develop the Record adequately. "To establish a disability claim, the claimant bears the initial burden of proof to show that he is unable to perform his past relevant work." *Frankl v. Shalala*, 47 F.3d 935, 937 (8th Cir. 1995) (citing *Reed v. Sullivan*, 988 F.2d 812, 815 (8th Cir. 1993)); *see also Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir.

1998) (describing five-step evaluation process); *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) (“[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.”) (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)).

To meet this burden, the claimant must “furnish medical and other evidence that [the Commissioner] can use to reach conclusions about [the claimant’s] medical impairment(s)[.]” 20 C.F.R. § 404.1512(a) (1990) Notably, the regulations advise a claimant the Commissioner “will consider only impairment(s) you say you have *or about which [the Commissioner] receive[s] evidence.*” *Id.* (emphasis added). Although ordinarily a claimant bears the initial burden to establish a disability, the Eighth Circuit Court of Appeals has recognized that “under well-settled principles of law, ‘[i]t is the ALJ’s duty to develop the record fully and fairly, even in cases in which the claimant is represented by counsel.’” *Delrosa v. Sullivan*, 922 F.2d 480, 485 n.5 (8th Cir. 1991) (quoting *Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (in turn citing *Dozier v. Heckler*, 754 F.2d 274, 276 (8th Cir. 1985))).

In particular, when an examining neurologist suggests a claimant’s condition warrants further testing, but no further testing is conducted, “the ALJ may have failed in his duty to adequately develop the record.” *Tate v. Apfel*, 167 F.3d 1191, 1198 (8th Cir. 1999) (citing *Delrosa, supra*, where the court held that in those circumstances, “the ALJ’s conclusion . . . is, at best, based on an incomplete medical record”); *Barrett v. Shalala*, 38 F.3d 1019, 1023 (8th Cir. 1994) (ALJ has duty to order additional tests when “the medical records presented to him do not give sufficient medical evidence to determine whether the claimant is disabled”).

In the present case, there are indications further testing was necessary relating both to Burks’s mental condition and to his physical condition. Regarding his mental condition,

although the nurse practitioner's evaluation is not controlling, her evaluation apparently was accepted and adopted by Dr. Brinck, who prescribed Zyprexa, an anti-psychotic medication, and later Celexa, an antidepressant. Burks testified he saw the nurse practitioner monthly, and sometimes saw the doctor, but there are no other treatment notes in the Record.

In addition, with regard to Burks's physical condition, Dr. Clark thought it was important that Burks undergo additional testing to determine the cause of his headaches. The doctor recommended a brain CT or MRI, and the initiation of medical management of the headaches. (R. 141) There is nothing in the Record to indicate any testing or treatment was initiated.

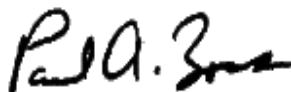
Although there is substantial evidence to support the ALJ's conclusion regarding Burks's ability to perform the physical requirements of his past relevant work, the court finds the Record does not contain substantial evidence to support a determination that Burks is not disabled on the basis of either his mental condition or his headaches. Even Dr. Notch, the consulted psychologist, concluded there was insufficient evidence in the record to make a determination of Burks's disability for the period prior to January 10, 2002. Further evidence is crucial in this case, where the VE opined that if Burks frequently would lose his attention, concentration and pace, and fail to complete tasks in a timely manner, he would be unable to perform his past relevant work. Therefore, the court recommends this case be remanded for further development of the Record on these issues.

## **V. CONCLUSION**

For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections<sup>4</sup> to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that this case be remanded to the Commissioner with instructions to fully develop the Record, and to reconsider her decision based on adequate evidence.

**IT IS SO ORDERED.**

**DATED** this 3rd day of November, 2003.



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PAUL A. ZOSS  
MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT

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<sup>4</sup>Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).